PUBLIC BANK BHD v. RIA REALITI SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
NOR BEE ARIFFIN JCA
RAVINTHRAN PARAMAGURU JCA
[CIVIL APPEAL NO: S-02(IM)(NCVC)-529-03-2019]
19 JANUARY 2021

CONTRACT: *Agreement – Loan – Illegal loan agreement – Purchase of native titles on behalf of company – Sale and purchase agreements entered into illegal and in contravention of ss. 17 and 64 of Land Ordinance (Sabah) (Cap 68) – Whether borrower could argue that bank intended to breach s. 24 of Contracts Act 1950 by advancing unlawful purpose in granting loan – Whether illegality of sale of native titles tainted loan agreements and related security documents – Whether bank could recover outstanding loans – Whether bank could seek restitutionary relief – Whether bank entitled to outstanding sums*

The first respondent had executed sale and purchase agreements ('SPAs') and a supplementary agreement ('SA') with Foo Choo (Sabah) Sdn Bhd to purchase the remaining term of the sub-leases of 224 parcels of land held under native title. The SPAs envisaged the registration of the title of the native lands from the owner, a native, to the first respondent's nominee, the second respondent, who was also a native. The appellant (i) granted credit facilities, in the sum of RM2 million, to part finance the purchase; (ii) provided fixed loan and overdraft, in the sum of RM5.2 million, as working capital for the purpose of developing the land; and (iii) procured third party charges on the native lands and charges on the sub-leases on several non-native lands as security for the loan. The second to fifth respondents, the shareholders and directors of the first respondents, acted as guarantors for these loan facilities. The first respondent's repayment came to a halt when it was wound up. At the winding-up court, the issue that was brought forth was that the SPAs were illegal as they contravened ss. 17 and 64 of the Land Ordinance (Sabah) (Cap 68) ('Ordinance'). The winding-up court's judge, in winding up the first respondent, held that (i) the real intention of the SPAs was not only for the purchase of the sub-leases, which was illegal under the law, but also for the purchase of the native titles on behalf of the company which was illegal; and (ii) even though it was not an issue for determination in the winding-up proceedings, the loan arrangement between the appellant and the first respondent was illegal. The appellant commenced an action at the High Court, against the second to fifth respondents as guarantors, for the repayment of the loans totalling to RM5,676,996.72. The respondent's defence was that the financing

transactions were illegal because it was for the purpose of purchasing native lands by a non-native entity; therefore all the guarantee and indemnity agreements were illegal as well. However, in their counterclaims, the second respondent sought to secure the discharge of the charges on the native titles while the fourth and fifth respondents sought for the titles and sub-leases to be handed over to the liquidator of the first respondent. The action was summarily determined and dismissed. Hence, the present appeal. The issues that arose for determination were: (i) whether the illegality of the sale of the native titles tainted all the loan agreements and the related security documents in question to the extent that the appellant could not recover the outstanding loans; and (ii) if the loans agreements were tainted with illegality, whether the appellant could still seek restitutionary relief.

Held (allowing appeal)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) The first respondent, as the borrower, had made an express representation in the loan agreement that the financing arrangement did not contravene any laws. The appellant, as the financier, was perfectly entitled to rely on this contractual representation. It was not incumbent upon the appellant to investigate if there was any illegality attached to the underlying SPAs. The respondents could not now say that the appellant had intended to breach s. 24 of the Contracts Act 1950 by advancing an unlawful purpose in granting the loans in question. On the face of the loan agreements, which was to finance the purchase of the sub-leases, there would have been no reason for the appellant to perceive that the first respondent wanted to buy native title lands by circumventing ss. 17 and 64 of the Ordinance. (paras 39 & 40)

(2) It may be well that the vendor and the first respondent intended to circumvent the law *via* the said SPAs. However, the illegality of the SPAs could not be extended to the loan agreements and the related security documents. It could not be said that the appellant was not a *bona fide* lender without notice of the illegality committed by the first and second respondents. The consideration or object of the loan agreements, which was primarily the financing of the purchase of sub-leases, was therefore legal. Therefore, based on the ground that the loan agreements, the letters of guarantee and other related security documents were not tainted by illegality, the appellant had proved the outstanding amount and was entitled to judgment as prayed against the respondents. (paras 41 & 42)

(3) In respect of the charges on the sub-leases, which were registered as security in favour of the appellant, the claim for the discharge of the charges and return of the titles by the second to fifth respondents was unmeritorious. Creation of sub-leases of native land to non-natives are legal under the Ordinance and, in the instant case, the first respondent remained the registered owner of the sub-leases which were charged as security. In the case of the native titles that were registered in the name of the second respondent, even if the SPAs were illegal, the property had passed. Therefore, the charges executed by the first respondent on the sub-leases and the charges executed by the second respondent on the titles in favour of the appellant as security for the loans in question were valid. All counterclaims should be dismissed. (para 42)

(4) The obvious purpose of the prohibition in ss. 17 and 64 of the Ordinance was to protect native ownership of land held under native title and customary tenure. The provisions do not expressly outlaw a bank from financing such a transaction. The appellant was not a party that was in contemplation of s. 17 of the Ordinance. It was neither a native seller or buyer of native land; it was the mere financier of a non-native (the first respondent) who purchased mainly sub-leases of native titles. The agreement also provided for the transfer of the native titles to a native nominee (the second respondent). However, the second respondent was not a nominee in the ordinary sense who would have no interest in the land. He was the managing director and shareholder of the non-native *de facto* purchaser. In other words, barring the appellant from the first respondent and guarantors, namely the second to fifth respondents, who would have indirectly benefited from the loans in question could not be said to enhance protection of native ownership of land. In any event, the appellant was not seeking registration of any native title which could be construed as divesting ownership of land to a non-native owner. The appellant was only seeking to enforce remedies under the loan and guarantee agreements which would not have any impact on native ownership of land. (paras 49, 50 & 56)

(5) The appellant had nothing to do with the SPAs. The first loan was given about five months after the execution of the SPA. The loans to develop the property was given out more than a year later. If the appellant was denied relief merely because the actual buyer, seller and nominee had participated in illegality, banks would be burdened with the onerous duty to investigate the purpose of loans and details of transactions involving nominees and actual purchasers. Even if the loan agreements were tainted by illegality, it was obvious that there was lack of intention

A on the part of the appellant who was a mere financier. It was the respondents, especially the second and third respondents, who intended to commit an illegal transaction as they signed the SPAs. (paras 51 & 54)

(6) The culpability of the appellant was miniscule compared to that of the respondents whose blatant and unmitigated illegality ran like a thread
B throughout the transaction in question. The enormity of the culpability of the respondents must also be viewed in light of the actions that led to the winding up of the first respondent. When the illegality argument was picked up by the winding-up court, none of the respondents contested it. In the present action, on the one hand, the second to fifth
C respondents were claiming that the appellant could not rely on the loan agreements and related documents that were allegedly illegal but, on the other hand, they sought the return of the lands which were charged in the same alleged illegal transaction. They were guilty of approbating and reprobating and of bad faith. (paras 56-57)

D **(7)** The entire financing arrangement was not illegal. The loan agreements and related security documents, including all the charges and guarantees were not illegal and were enforceable. Therefore, the second to fifth respondents were liable to the appellant in respect of its claim. (para 67)

Case(s) referred to:

E *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC* ***(refd)***

Beca (M) Sdn Bhd v. Tang Choong Kuang & Anor [1986] 1 CLJ 20; [1986] CLJ (Rep) 64 SC ***(refd)***

Chang Yun Tai & Ors. v. HSBC Bank (M) Bhd & Other Appeals [2011] 7 CLJ 909 FC ***(refd)***

F *CIMB Bank Bhd v. Gan Teow Hooi & Ors [2012] 9 CLJ 1003 CA* ***(refd)***

Holman v. Johnson [1775-1802] All ER Rep 98 ***(refd)***

Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd & Other Appeals [2014] 7 CLJ 597 FC ***(refd)***

Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2019] 1 CLJ 183 FC ***(refd)***

G *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC* ***(refd)***

Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors [2012] 9 CLJ 1014 CA ***(refd)***

Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors [2017] 9 CLJ 401 FC ***(dist)***

H *Menaka v. Lum Kum Chum [1976] 1 LNS 181 PC* ***(refd)***

Ng Siew San v. Menaka [1973] 1 LNS 99 FC ***(refd)***

Norsitah Ottoh & Ors v. Rosinah Nasry & Ors [2018] 1 LNS 1585 CA ***(refd)***

Pang Mun Chung & Anor v. Cheong Huey Charn [2018] 8 CLJ 663 CA ***(refd)***

Patel v. Mirza [2016] UKSC 42 ***(refd)***

Sajan Singh v. Sardara Ali [1959] 1 LNS 90 PC ***(refd)***

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Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96 FC ***(refd)***
Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd [2014] 3 CLJ 141 FC ***(refd)***
Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor [2017] 6 CLJ 368 CA ***(refd)***
Tinsley v. Milligan [1994] 1 AC 340 ***(refd)***
Vershures Creameries Ltd v. Hull and Netherlands Steamship Co Ltd [1921] 2 KB 608 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24, 66, 71
Land Ordinance (Sabah) (Cap 68), ss. 17(1), (3), (5), 64(1)
Rules of Court 2012, O. 14A

For the appellant - Simon Shim, Pearl Lee Chee Shia & Shim Mong Seng; M/s Shim, Pang & Co
For the 2nd & 3rd respondents - Ryan Soo; M/s RYCO Law Firm
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[Editor's note: Appeal from High Court, Sandakan; Suit No: SDK-22NCVC-4-3-2016(HC) (overruled).]

Reported by Najib Tamby

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] This is an appeal by the bank against the dismissal of its claim against four guarantors who were shareholders and directors of a company that borrowed money to purchase property. The case was summarily determined under O. 14A of the Rules of Court 2012. The action originally included a claim against the borrower and a corporate guarantor. By the time of the hearing, both the borrower and the corporate guarantor had been wound up. The matter proceeded against the four guarantors only. The High Court dismissed the claim of the bank against the four guarantors on the principal ground that the loan was for the purpose of financing the purchase of native lands by a non-native in contravention of s. 17 of the Land Ordinance (Sabah) (Cap. 68). We shall first set out the relevant underlying facts of the claim and defence before discussing the legal issues that arise in this appeal.

Appellants' Claim

[2] The first respondent executed a sale and purchase agreement dated 2 March 2005 and a supplementary agreement dated 5 May 2005 to purchase the remaining term of the subleases of 224 parcels of land held under native title. The vendor in the said sale and purchase agreements was Foo Choo (Sabah) Sdn Bhd which was the original sub-lessee of the said native lands.

A One of the recitals in the sale and purchase agreements also envisaged the registration of the title of the native lands from the owner (Lian Kee Chu who is a native) to the first respondent's nominee, ie, the second respondent who is also a native. The first respondent paid part of the purchase price. The remaining balance of the purchase price was RM2,000,000. The first
B respondent approached the appellant which is a bank for credit facility in the sum of RM2,000,000. In June of 2005, the appellant granted credit facilities in the sum of RM2,000,000 to part finance the purchase under said sale and purchase agreement and the supplementary agreement. The second to fifth respondents who were shareholders and directors of the first respondent
C executed guarantee agreements referred as "guarantee and indemnity" in favour of the appellant to secure the loan. The appellant also procured third party charges on the said native lands and charges on the said sub-leases as well as charges on several non-native lands as security for the loan.

[3] Apart from granting credit facility to finance the purchase under the
D said sale and purchase agreements, the appellant also provided additional loans in the form of fixed loan and overdraft in the sum of RM5,200,000 as working capital between July 2007 and June 2008 for the purpose of development of the land. Again, the second to fifth respondents acted as guarantors for the said loan facility. The appellant procured further third
E party charges on the titles to the native lands and charges on the sub-leases in question and other non-native lands.

[4] The first respondent utilised the credit facilities granted by the appellant and started repaying the same. However, the repayments came to a halt when the first respondent was wound up on 15 April 2016 pursuant
F to a dispute between shareholders. The winding-up petition was initiated by the fourth and fifth respondents herein (first and third petitioners in the winding-up action) and one Khoo Seng Peng on the ground of irretrievable breakdown of relationship between the shareholders. However, the ground that was pursued seriously at the hearing and taken up by the winding-up
G court was that the sale and purchase agreements in respect of the native lands were illegal as they contravened ss. 17 and 64 of the Land Ordinance (Sabah) (Cap. 68). It was argued that the substratum of the first respondent (Ria Realiti Sdn Bhd) failed as its core assets were sub-leases of the native lands purchased through sale and purchase agreements that also provided for sale of native land to a non-native. The respondents in the winding-up petition
H (which includes second and third respondents herein) did not dispute the said argument as noted by the winding-up court judge. The winding-up court presided by Douglas Primus J said as follows:

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> The Petitioners have taken the position that the use of Mr. Wong Kien Ching as a nominee for Ria Realiti Sdn Bhd in that all the native titled land purchased by Ria Realiti and part financed by Public Bank Berhad and registered under Wong Kien Ching's name, was designed to circumvent Section 17 and Section 64 of the Land Ordinance and is therefore null and void.
> **The Respondents do not deny this.** (emphasis added)

[5] Douglas Primus J then found that the "real intention of the agreements was not only for the purchase of the sub-leases which is legal under the law but also for the purchase of the native titles on behalf of the company which is illegal". This finding was the sole basis for the decision to wind up the first respondent. The appellant bank appeared as intervener in the said proceedings as it feared that its interest in the charges on the native titles would be affected. Douglas Primus J when granting the winding-up petition on 15 April 2016 did not make any order in respect of the charges secured by the appellant for the loans that it granted to the first respondent. However, Douglas Primus J pronounced that the loan arrangement between the appellant herein and the first respondent was "illegal" although that was not an issue that required determination for the purpose of the winding-up proceedings. The sixth respondent (Rasamutu Sdn Bhd) was also wound up on 6 June 2016 on similar grounds, ie, being a party to the breach of ss. 17 and 64 Land Ordinance (Sabah) (Cap 68) by Douglas Primus J. The appeals against the said winding-up orders were dismissed by the Court of Appeal. In the instant action for repayment of the loans granted to the first respondent, the appellant proceeded only against the second to fifth respondents who were the directors and shareholders who executed the guarantee agreements.

[6] It is the case of the appellant in the statement of claim that as at the commencement of this action on 31 December 2015, the second to fifth respondents were indebted to the appellant in the total sum of RM5,676,996.72. The appellant is now claiming the said sum with interest at the base lending rate of 6.85% per annum above 3.5% per annum at daily rests from 1 January 2016 till date of full realisation.

The Defence

[7] The second, third and sixth respondents filed a joint statement of defence and counterclaim. The crux of the defence is that the finance facilities granted by the appellant to the first respondent was for the purchase of native lands by a non-native (the first respondent) through a nominee (the second respondent). Therefore, the entire loan transaction was tainted with illegality. The second respondent also counterclaimed for a discharge of the charges that he executed in respect of the said native titles. The fourth and

fifth respondents filed a joint statement of defence and counterclaim. They pleaded that the second respondent had admitted to illegality in securing the transfer of the native lands into his name in the winding-up proceedings before Douglas Primus J. They pleaded that the entire financing arrangement is tainted with illegality and therefore the guarantees that they executed are illegal as well. In the counterclaim, the fourth and fifth respondents prayed that the 224 native titles and the sub-leases be handed over to the liquidator of the first respondent. Thus, to sum up, the defence of all the respondents was that the financing transactions were illegal because it was for the purpose of purchasing native lands by a non-native entity. Therefore, all the guarantee and indemnity agreements are illegal as well. Nonetheless, it must be noted that in the counterclaim action, notwithstanding the fact that properties in question were purchased with loans from the appellant in a transaction which the respondents alleged was tainted with illegality, the second respondent sought the court's aid in securing the discharge of the charges on the NT titles. And the fourth and fifth respondents who also alleged that the entire transaction was tainted with illegality, sought the court's aid for the titles and sub-leases to be handed over to the liquidator of the first respondent. It must be mentioned here that the counterclaim action was stayed by learned Judicial Commissioner at the conclusion of the O. 14A application pending the disposal of Originating Summons No. SDK-24NCvC-3-2-2019. That action was filed by the second and third respondents to determine the validity of the second respondent's freehold native titles.

Order 14A Application

[8] The O. 14A application was filed by the appellant. The learned Judicial Commissioner at the High Court refined the issues in the application as follows:

> (1) What is the effect (if any) of the decision delivered by the Sandakan High Court on 15.04.2016 in the Winding Up Petition against the 1st Defendant *vide* Petition No. SDK-28-2/1-2012 on the following documents:
>
> (i) the Sale and Purchase Agreement dated 02.03.2005 between Foo Choo (Sabah) Sdn Bhd and the 1st Defendant and Lian Kee Chu;
>
> (ii) the Letters of Offer and the Facilities Agreement executed between the Plaintiff and the 1st Defendant;
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> (iii) the Guarantees executed by the 2nd, 3rd, 4th, 5th and 6th Defendants in favour of the Plaintiff;
>
> (iv) the 1st Party Memoranda of Charge of the subject Sub-Lease executed by the 1st Defendant in favour of the Plaintiff;

(v) the 3rd Party Memoranda of Charge of the subject Native Lands executed by the 2nd Defendant in favour of the Plaintiff; and

(vi) the Supplementary Agreement dated 5.5.2005 between Foo Choo (Sabah) Sdn Bhd and the 1st Defendant and Lian Kee Chu.

(2) Are the subleases of the NT Lands to the 1st Defendant legal? If not, what is the effect (if any) on the said Documents stated above?

(3) If the aforesaid Letters of Offer, the Facilities Agreement, the Guarantees, the 1st Party Memoranda of Charge and/or the 3rd Party Memoranda of Charge, and/or the Supplementary Agreement all described in Issue 1 are valid and enforceable, whether the 2nd, 3rd, 4th and 5th Defendants are liable to the Plaintiff in respect of its claims in the Statement of Claim?

(4) (a) If any of the said Documents are null, void and/or unenforceable, then whether the Defendants are entitled to their counterclaims?

(b) If any of the said Documents can be severed to remove the illegality, which portions are to be severed and whether the remaining portions of the said Documents are enforceable?

(5) Whether the purchase price stated in the Sale and Purchase Agreement and/or Supplementary Agreement is wholly for the purchase of the Sublease or the said Lands? If the purchase price stated in the Sale and Purchase Agreement and/or Supplementary Agreement is partly for the purchase of the Sublease i.e. RM5,113,416.00, whether severance on the portion of the purchase of the said Lands may be effected?

(6) In the event that aforesaid documents described in Issue 1 are held to be void and severance may not be effected, whether the Plaintiff is entitled to and the Court may grant remedy to the Plaintiff under:

Decision Of High Court

[9] The learned Judicial Commissioner relied heavily on the judgment of Douglas Primus J who wound up the first respondent. Briefly stated, Douglas Primus J found that the sale and purchase agreement was not only for the sub-leases of 224 parcels of native land (which is permitted under the Land Ordinance (Sabah) (Cap 68)) but that it was also for the purchase of the native titles which covered the said sub-leases. As we stated earlier, Douglas Primus J at the winding-up court also pronounced that the financial arrangement was a scheme designed to circumvent the law. His Lordship said as follows:

Because of the provisions in the Land Ordinance that prohibits dealings of native lands by non-natives, the financial arrangement between Ria Realiti Sdn Bhd and the 7th Respondent and the use of Wong Kien Ching was indeed a scheme designed to circumvent the law and in particular Section 17 and Section 64 of the Sabah Land Ordinance. This

A is illegal and I so rule. With this finding on illegality, section 24 of the Contract Act coming into play, and I now must consider with this question of illegality, whether the substratum of Ria Realiti Sdn Bhd is gone.

[10] The learned Judicial Commissioner relied on the statement of Douglas
B Primus J that the "financial arrangement was a scheme designed to circumvent the law" to address the issue pertaining to the obligation of the second to fifth respondents under the facilities agreement and the guarantee agreements and dismissed the claim of the appellant.

Issues

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[11] Before we proceed further, we bear in mind that the O. 14A procedure is meant for cases where the determination of a point of law would also determine the entire case and where the underlying facts disclosed in the pleadings and affidavits are sufficient to make the said determination (see *Kerajaan Negeri Kelantan v. Petroliam Nasional Bhd & Other Appeals* [2014] 7
D CLJ 597).

[12] To recapitulate the crucial underlying facts of the claim, it was undisputed in the affidavits that the appellant as the financier bank provided a fixed loan of RM2,000,000 to finance purchase of the sub-leases of the 224
E parcels of native land and the relevant titles. It was also undisputed that the appellant provided loans in the sum of RM5,200,000 later in different transactions to finance the working capital to develop the lands in question. The fact that repayment of the above-mentioned loans was stopped by the first respondent is not disputed. Thus, the basic underlying facts pertaining to the questions raised in the application are not substantially disputed in the
F pleadings and affidavits.

[13] The main defence mounted by the defendants is that the entire loan transaction, ie, not only loan agreements to finance the purchase of the sub-leases and titles under the sale and purchase agreements but also the loan
G agreements through which the first respondent obtained working capital is tainted with illegality due to breach of ss. 17 and 64 of the Land Ordinance (Sabah) (Cap 68). This illegality allegedly tainted the loan agreements, the charges and the guarantee agreements. The end result is that the second to fifth respondents are freed of their obligations under the various guarantee agreements that they executed to provide security to the appellant who
H disbursed loans in the total sum of RM7,200,000 to first respondent. Thus, in short, it was the appellant's fault for lending money to a company that the respondents owned. This argument involves questions of law substantially. In the premises, we find that the learned Judicial Commissioner was not wrong in allowing the application of the appellant to determine the matter
I by way of O. 14A of the Rules of Court 2012.

[14] In our view, the pivotal issue that will bear on the claim of the appellant is whether illegality in respect of the sale of the native titles tainted all the loan agreements and the related security documents in question to the extent that the appellant cannot recover the outstanding loans. Assuming that the loans agreements were tainted with illegality, the next issue would be whether the appellant can still seek restitutionary relief. Counsel for the appellant and respondents devoted lengthy arguments on these issues. We shall briefly state their arguments before proceeding further.

Argument Of Appellant

[15] The first argument of counsel for the appellant is that the appellant was not in *pari delicto* in relation to the loans granted to the first respondent. The loan agreements are independent of sale and purchase agreements executed between the first respondent and the vendor. The appellant is a mere financier who has nothing to do with the sale and purchase transaction. He submitted that loan agreements between the financier and buyer are distinct from the sale agreements that were financed by it and are not affected by the illegality of the latter.

[16] Furthermore, the sale and purchase agreements were substantially for sale of the sub-leases to the first respondent which is permitted under the Land Ordinance (Sabah) (Cap. 68) although the recitals mention that the native titles will be registered in the name of the second respondent. As all the native titles in question were subject to the registered sub-leases, counsel for the appellant submitted that based on the valuation report, the commercial value of the titles was about only 1% of value of the sub-leases. Thus, the purpose of the bank loan of RM2,000,000 was for the purchase of the sub-leases rather than the native titles. Counsel for appellant also submitted that in any event, the portion of the sale and purchase agreement pertaining to the titles can be severed from the portion respecting sale of subleases.

[17] Secondly, it was argued that even if the loan agreements are tainted with illegality, the appellant are entitled to restitutionary relief under ss. 66 and 71 of the Contracts Act 1950. Finally, counsel for the appellant urged the court to consider the recent development in common law in respect of the illegality defence that emanated from the English Supreme Court majority decision in *Patel v. Mirza* [2016] UKSC 42 that mitigated the harshness of the traditional illegality defence. He submitted that this is a suitable case for the application of the new judicial approach initiated in *Patel v. Mirza* (*supra*) that affords relief even if both parties in are in *pari delicto* in respect of the illegal transaction in question. The reasons submitted by counsel for appellant, briefly stated, are as follows.

[18] In respect of the loan agreements, counsel for the appellant submitted that there was no evidence that the appellant as the lender had knowingly taken part in a scheme to facilitate purchase of native lands or otherwise or had intention to advance an unlawful purpose. Douglas Primus J at the winding-up court and the learned Judicial Commissioner in the instant case made no reference to the knowledge of the appellant. In fact, there was a representation in the loan agreements made by the first respondent that no law was contravened. On the other hand, the respondents were relying on their own illegal action in relation to purchase of native lands to defeat the just claim of the appellant who part financed the said purchase upon the request of the first respondent. The second to fifth respondents as directors and shareholders of the first respondent would surely have benefited from the loans in the total sum of RM7,200,000 granted by the appellant. Thus, notwithstanding the fact that the borrower is a company, the respondents would implicitly gain an undeserved windfall due to their immoral and illegal act in dealing with native land.

Argument Of The Respondents

[19] Counsel for second and third respondents submitted as follows. The judgment of the court below is correct as it is in line with pronouncement of the Douglas Primus J in the winding-up court that the entire financing arrangement is illegal. He argued that the pronouncement of Douglas Primus J on the loan arrangement was not mere *obiter dicta* but that it was the *ratio decidendi* of the case. Counsel for the second and third respondents also submitted on the authority of the Federal Court case of *Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors* [2017] 9 CLJ 401 (hereinafter referred to as the *"Neway* case") that the loan arrangement is illegal. He argued that the various loan agreements cannot be severed from sale and purchase agreements as the loan agreements state that the purpose of the loan was to "part finance the purchase of 224 parcels of vacant oil palm estates" and "to acquire additional lands".

[20] He also raised a further argument that the 99-year sub-leases granted by the original owner of the native lands to the vendor on 5 February 2001 were illegal as by that time the maximum lease period had been limited to 30 years by an amendment to the Land Ordinance (Sabah) (Cap. 68) on 30 December 2000. However, we note that this issue was not raised during the framing of the O. 14A questions. It was not raised in the affidavits as well by the respondents. In the court below as well as in the winding-up court, the case was approached on the basis that only the sale of native titles contravened the law. In any event, the appellant did not provide any financing for the purchase of the sub-leases in 2001 to the vendor. In the premises, this is not a relevant issue insofar as the argument that the financing arrangement granted to the first respondent in 2005 is illegal is concerned.

[21] In respect of the sale and purchase agreements through which sub-leases were sold by the vendor to the first respondent, counsel for second and third respondents submitted that as they also contained a provision to register the native titles in the name of the second respondent who is a native, the entire sale is illegal as pronounced by Douglas Primus J in the winding-up court. He also submitted that the second and third respondents were not unjustly enriched as they did not receive any benefit from the financial arrangement.

[22] Counsel for fourth and fifth respondents' arguments were similar. He submitted that the appellant was complicit in the transaction to purchase native titles as it is stated in the letter of offer that the purpose of the loan was to "part finance 224 parcels of vacant oil palm estates". Furthermore, it was stated in the sale and purchase agreements that the second respondent who is not a borrower or a party to the loan agreements would be registered as the owner of the freehold native titles. The consideration was one single indivisible purchase of both the subleases and native titles for a price of RM5,992,030. For this reason, he submitted that there cannot be severance of the sale of the subleases and the native titles. In respect of the loan agreements, he said the loan for the working capital cannot be severed from the loan for the purchase as they referred to the native titles registered in the name of Wong Kien Chieng (the second respondent) who is the nominee of the first respondent.

Relevant Statutory Provisions On Illegality

[23] For ease of understanding the illegality issue pertaining to purchase of native lands in Sabah, we reproduce below s. 17(1), (3) and (5) and s. 64 of the Land Ordinance (Sabah) (Cap. 68):

> 17(1) Except with the written permission of the Minister all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and no such dealings shall be valid or shall be recognised in any court of law unless they shall have been entered into and concluded before the 16th day of January, 1883, or in the terms of the next following clause.
>
> (3) Nothing in subsection (1) or (2) shall be held to prevent dealings in land between any non-native and a native who is the holder of a lease issued under Part II or Part III in respect of such land.
>
> 17(5) Notwithstanding the provisions of this section and of section 64, it shall be lawful for the owner of land held under the provisions of Part IV to grant a sublease of such land to a non-native for a term not exceeding thirty years.

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> 64(1) This Part shall apply only to lands held by natives, and no non-native may purchase any land held under this Part, unless in accordance with the terms of section 17, or acquire any interest therein by way of charge or otherwise.

[24] At first glance, s. 17(1) appears to bar all dealings in land between
B natives and non-natives regardless of the type of land. But a closer reading of the entire section and s. 64 reveal that the prohibition is only in respect of lands held under native title (NT land) under Part IV or land held under customary tenure (also known as native customary land) under Part I for which no title is issued. This is because s. 17(3) expressly says that there is
C no prohibition in respect of leases issued under Part II and Part III. Part II of the Ordinance deals with land held under country lease (CL land) whereas Part III deals with land held under town lease (TL land).

[25] Part IV of the Ordinance deals with NT land. Section 64(1) bars non-natives from buying land held under native title unless in accordance
D with s. 17(1). Thus, it is clear that purchase of land held by natives under native title or under customary tenure by non-natives are generally forbidden but purchase of sub-leases of land held under native titles are not similarly barred.

[26] It was argued on behalf of the respondents that the financing
E arrangement fell within the ambit of s. 24 of the Contracts Act 1950 as it contravened written law. For ease of reference, we reproduce s. 24 (shorn of illustrations) of the Contracts Act 1950 below before considering the illegality issue:

> 24. What considerations and objects are lawful, and what not
>
> F
>
> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> G
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or
> H consideration is unlawful is void.

Whether Financing Arrangement Tainted By Illegality?

[27] It will be recalled that the first respondent was wound up on the ground that its substratum failed as all the sub-leases it owned which was its
I core asset and purpose of its existence were tainted with illegality. The

winding-up petition came about because of a dispute between its shareholders. Nonetheless, once the illegality argument was pursued and taken up by the winding-up court, none of the directors and shareholders (second to fifth respondents) defended the sale purchase and agreements in respect of the sub-leases which are permitted under the Land Ordinance (Sabah) (Cap. 68). They were content to concede that all sale and purchase agreements which included the purchase of the titles as well sub-leases were illegal. The appellant joined the winding-up action as an intervener as it was concerned about the charges on the sub-leases which had been procured as security for the loans. Although, the winding-up court did not pronounce on the validity of the charges, it pronounced that the entire financing arrangement was illegal. The appellant who joined as an intervener filed an appeal out of time against the winding-up decision. The motion to extend time was dismissed by the Court of Appeal and thus the appeal was not heard on its merits.

[28] The learned Judicial Commissioner did not in so many words hold that he was bound by the pronouncement of the winding-up court that the entire financing arrangement was illegal. However, he ruled that the pronouncement of Douglas Primus J in respect of the loan transaction was not extraneous or mere *obiter dicta*. He cited with approval the passages from the judgment of Douglas Primus J that we quoted earlier in which the financing arrangement was declared illegal. The learned Judicial Commissioner then held that the financing arrangement was illegal for breach of ss. 17 and 64 of the Land Ordinance (Sabah) (Cap. 68). In our view, notwithstanding the intervention of the appellant in the winding-up petition, the pronouncement of Douglas Primus J on the legal status of the financing arrangement is obviously a passing statement as it was not a relevant issue for the purpose of deciding whether the substratum of the first respondent had collapsed. In any event, the learned Judicial Commissioner was not bound by the decision of a court of co-ordinate jurisdiction. The learned Judicial Commissioner also considered other eminent authorities especially the *Neway* case (*supra*) for ruling that the entire financing arrangement was illegal. We shall presently consider the said case and decide whether the said case is on all fours with the instant case.

[29] Counsel for the appellant argued persuasively that a finding that the sale and purchase agreements are illegal because they included the purchase of native titles cannot automatically render the loan agreements unenforceable and render the security documents void. He cited two cases. In *Chang Yun Tai & Ors. v. HSBC Bank (M) Bhd & Other Appeals* [2011] 7 CLJ 909, the purchasers of housing units alleged that the sale and purchase agreement between them and the developer was void for having contravened

various written laws. The purchasers also argued that consequently their loan agreements with the banks were also void. The Federal Court held that as the banks were not a party to the sale and purchase agreement, no duty was cast on them to ensure that the said agreements were free from legal infirmities. Secondly, the Federal Court held that the sale and purchase agreements were distinct and separate contracts and therefore the liability to repay the loans under the loan agreements remained. Thirdly, the court held that as there was no illegal object or consideration under the loan agreements, s. 24 of the Contracts Act 1950 did not apply.

[30] In *CIMB Bank Bhd v. Gan Teow Hooi & Ors* [2012] 9 CLJ 1003; [2013] 1 MLJ 267 which is the second authority cited by counsel for the appellant, the contractor who was engaged to construct a house did not possess a housing developer's licence. The Court of Appeal held that notwithstanding non-compliance with the law, the loan agreement was valid. The court cited the case of *Beca (M) Sdn Bhd v. Tang Choong Kuang & Anor* [1986] 1 CLJ 20; [1986] CLJ (Rep) 64 where the former Supreme Court said that not all breaches of statutory prohibition would render an agreement illegal or void as it would depend on the construction of the statute. The full passage reads as follows:

> ... Not every breach of a statutory prohibition would render an agreement illegal or void though such breach may attract criminal penalty. The fundamental question is whether the Enactment means to prohibit the agreement. It is important that the courts should be slow to imply the statutory prohibition of agreements, and should do so only when the implication is clear. Whether an agreement is implicitly forbidden depends upon the construction of the statute, and for this purpose no one tests is decisive. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice. It would be a different matter when the law is unwittingly broken. An agreement for the sale of, say, frozen food, is not to be considered illegal or void merely because the premises in which the frozen food is sold does not comply with the law. We recognise that each case must be decided by reference to the relevant statute.

[31] Counsel for appellant submitted that in the instant case what is forbidden in ss. 17 and 64 of the Land Ordinance (Sabah) (Cap. 68) is dealings relating to land held under native title. Therefore, the related financing arrangements cannot be unenforceable on the ground of illegality as the bank was not relying on the illegal sale and purchase agreements but on the loan agreements which are distinct and separate.

[32] We certainly find that the above-mentioned arguments based on the said eminent authorities to be cogent and persuasive. The appellant in the instant case was a mere financier who had loaned money to the first respondent to purchase property about five months after the tainted sale agreements were executed without the involvement of the appellant. The suit of the appellant is based on the loan agreements and not on the sale and purchase agreements.

[33] However, counsel for the respondents argued based on the *Neway* case (*supra*) which is a Federal Court case that breaches of ss. 17 and 64 of the Land Ordinance (Sabah) (Cap. 68) would render even the related financing agreements unenforceable. This is the main authority relied on by the respondents to support their argument that all loan agreements are tainted with illegality because the sale and purchase agreements contravened ss. 17 and 64 of the Land Ordinance (Sabah) (Cap. 68). The *Neway* case (*supra*) was the bedrock of the decision of the Judicial Commissioner in the court below and that of the winding-up court as well. It is a decision of the Federal Court that dealt with the issue of illegality in respect of native land in Sabah. In the premises, if the facts of instant case are indistinguishable from the *Neway* case (*supra*) or if the facts of the instant case otherwise lend itself to the application of the *ratio* of the said Federal Court case, having regard to the doctrine of *stare decisis*, we must perforce rule that the loan documents in the instant case are tainted with illegality.

Whether *Neway* Case Distinguishable?

[34] In our view, as submitted by counsel for the appellant, the facts of the *Neway* case (*supra*) are distinguishable from the instant case to the extent that they preclude the application of the *ratio* the former case. Therefore, the finding of the learned Judicial Commissioner to the effect that the loan agreements and the related security documents that include the charges and the guarantee agreement are also tainted by illegality was not warranted. Our reasons are as follows.

[35] In the *Neway* case (*supra*), the facts are as follows. The appellant bank granted the fourth respondent a term loan to part finance the purchase of native title land. The second and third respondents guaranteed the term loan and the bridging loan facility to finance the development project on the land. As the fourth respondent was not a native, a native nominee was used to hold the native land in trust. The said native was an employee of the fourth respondent. She executed a trust deed and a power of attorney to give absolute power to the fourth respondent to deal with the land. It is essential to note that it was actually the native nominee who entered into the sale and purchase agreement with the native vendor. The fourth respondent was not a party to the sale and purchase agreement. Thus, by using its native

employee, the fourth respondent circumvented the hurdle of ss. 17 and 64 of the Land Ordinance (Sabah) (Cap. 68) and became the *de facto* owner of valuable native title land. The appellant bank was aware that the loan was used for the acquisition of the native title land by the fourth respondent through the use of a native nominee. The term loan was later assigned to the first respondent by the fourth respondent with the full knowledge of the appellant. When the project failed, the appellant cancelled the loan facility and filed a claim for the outstanding sum.

[36] The Federal Court found that the purchase of the land was illegal *ab initio* and therefore "any subsequent instrument and documentation that linked to or arose out of the purchase would have been tainted with such illegality". The Federal Court, speaking through Richard Malanjum CJSS (as he then was), refused relief to the appellant bank who claimed the outstanding balance of the loan. Richard Malanjum CJSS said that the bank had not come to court with clean hands as it knew the purpose of the loan, ie, to finance the purchase of native title land by a non-native. The relevant passage dealing with illegality reads as follows:

> As such, the purchase of the native land itself was illegal *ab initio*. Section 24(a) and (b) of the Contracts Act 1950 is clear. In our view, no amount of gymnastic argument could remedy the default. Thus, any subsequent instrument and documentation that linked to or arose out of the purchase would have been tainted with such illegality. Hence, even the third party first legal charge security for the term loan given by the appellant was also tainted with illegality.

[37] However, we find that the facts of the instant case are significantly different in relation to the main purpose of the loan. In the letter of offer issued by the appellant before the loan agreements were signed, it is stated that the purpose of the loan was to "part finance 224 parcels of vacant oil palm estates". The reference to "parcels of vacant oil palm estates" does not necessarily mean that the loan was substantially for the purchase of 224 native titles. It is important to note that the letter of offer does not mention native titles. The property was generally stated as "vacant oil palm estates". As evidenced by the valuation report tendered by the appellant and which was not contradicted by the valuation report of a competing expert, the commercial value of a native title land which is subject to a sub-lease is only 1% of the value of the sub-lease. Thus, it is not inaccurate to conclude that from the commercial standpoint, about 99% of the loan of RM2,000,000 was for purchase of the 224 sub-leases of native title land. In fact, the lesser importance attached to the transfer of titles in sale and purchase agreement is also reflected in the precondition that the purchase price would be released upon issuance of the memorial number on the transfer of the sub-leases rather than the upon issuance of the memorial number on the transfer of freehold native titles. On the other hand, in the *Neway* case (*supra*), the loan agreement was solely to finance the purchase of native title land and nothing else.

[38] The second distinguishing feature is that the native nominee in this case (Wong Kien Ching, the second respondent) was the managing director and shareholder of the non-native purchaser, ie, the first respondent company. Thus, there is a very close connection between the non-native purchaser (first respondent company) who took the loan and the nominee purchaser. Thus, the second respondent can hardly be described as an ordinary nominee unlike the native nominee in the *Neway* case (*supra*). As managing director and substantial shareholder, the so-called native nominee was in fact a part owner of the non-native purchaser. By comparison, the native nominee in *Neway* case (*supra*) was the employee of the non-native purchaser and presumably had no stake in the native title after the sale transaction was completed. We also note that in the instant case, no trust deed was executed by the second respondent who was the native nominee in favour of the first respondent who was the non-native purchaser. A trust deed was perhaps unnecessary as the value of the native titles which were encumbered by sub-leases had little value and the so-called nominee was also the managing director of the non-native purchaser. On the other hand, the existence of the trust deed in the *Neway* case (*supra*) assumed significance and was pointed out by the Federal Court.

[39] The third distinguishing feature is that the High Court in the instant case did not make any finding that the appellant as the financier had any actual knowledge of the alleged breach of ss. 17 and 64 of the Land Ordinance (Sabah) (Cap. 68). Douglas Primus J in the winding-up court also did not make any finding that the bank had any knowledge of the illegality. In fact, the first respondent as the borrower had made an express representation in the loan agreement that the financing arrangement did not contravene any law (see cl. 14.1 of the facilities agreement). The second and third respondents herein signed the agreement on behalf of the first respondent. The relevant representation says that "the execution, delivery and performance of the facilities agreement and security documents by the borrower will not violate or contravene the provisions of:

> (i) any law, or regulation, or any order, or decree of any governmental authority, agency or court to whom any of them is subject:

[40] The appellant as the financier was therefore perfectly entitled to rely on this contractual representation. Therefore, it was not incumbent on the appellant to investigate if any illegality attached to the underlying sale and purchase agreements. In the premises, the respondents who were the directors of the first respondent cannot now say that the appellant had intended to breach s. 24 of the Contracts Act 1950 by advancing an unlawful purpose in granting the loans in question. On the other hand, there is no mention in the *Neway* case (*supra*) judgment, whether a similar representation

was given to the bank in the loan agreements. Instead, there was a finding by the court that the bank had knowledge of the illegality in the *Neway* case (*supra*). The bank in the *Neway* case (*supra*) consented to the assignment of the loans from the fourth respondent to the first respondent. Thus, it knew that the purpose of the loan was to enable a non-native purchaser to buy native title land from a native who would have no subsequent interest in the land. In the instant case, as we pointed out earlier, the second respondent who was the nominee and also the managing director of the *de facto* purchaser played an active role in the transaction. Given these facts, on the face of the loan agreements which was substantially to finance purchase of sub-leases, there would have been certainly no reason for the appellant to perceive that the first respondent wanted to buy native title lands by circumventing ss. 17 and 64 of the Land Ordinance (Sabah) (Cap. 68).

[41] Thus, it may well be that the vendor and the first respondent intended to circumvent the law *via* the said sale and purchase agreements. However, the illegality of the sale and purchase agreements cannot be extended to the loan agreements and the related security documents as was done in the *Neway* case (*supra*). Thus, in view of the distinguishing features that we pointed out, it cannot be said that the appellant bank was not a *bona fide* lender without notice of the illegality committed by the first respondent and second respondent. The consideration or object of the loan agreements which was primarily the financing of the purchase of sub-leases was therefore legal. In the premises, the principle enunciated in the Federal Court case of *Chang Yun Tai & Ors. v. HSBC Bank (M) Bhd & Other Appeals* (*supra*) should apply. We are of the view that had the learned Judicial Commissioner examined the facts of the instant case more closely before applying the *ratio* in the *Neway* case (*supra*), he would have granted relief to the appellant who is an innocent party in the loan transaction.

[42] In the premises, based on the ground that the loan agreements, the letters of guarantee and other related security documents are not tainted by illegality, the appellant has proved the outstanding amount by virtue of the certificate of indebtedness issued under cl. 1 of the said guarantee agreements. The appellant is therefore entitled to judgment as prayed against the respondents. In respect of the charges on the sub-leases which were registered as security in favour of the appellant, we find that the claim for the discharge of the charges and return of the titles by the second to fifth respondents to be unmeritorious. Creation of sub-leases of native land to non-natives are legal under the Land Ordinance (Sabah) (Cap. 68) and in the instant case, the first respondent remains the registered owner of the sub-leases which were charged as security. In the case of the native titles that were registered in the name of the second respondent, even if the sale and

purchase agreements were illegal, the property had passed (see *Sajan Singh v. Sardara Ali* [1959] 1 LNS 90; [1960] 1 MLJ 52). Therefore, the charges executed by the first respondent on the sub-leases and the charges executed by the second respondent on the titles in favour of the appellant as security for the loans in question are valid. In the premises, all the counterclaims should be dismissed.

[43] Assuming that we are wrong in distinguishing the facts of the *Neway* case (*supra*) and the instant case, we are of the view that the learned Judicial Commissioner could have given relief to the appellant by adopting the new approach in the common law introduced by the English Supreme Court case of *Patel v. Mirza* [2016] UKSC 42 that was endorsed by our Federal Court recently and could also have given restitutionary relief under s. 66 the Contracts Act 1950.

Relief Under *Patel v. Mirza*

[44] In *Patel v. Mirza* [2017] AC 467, the English Supreme Court mitigated the rigidity and harshness of the traditional illegality defence in the common law where a plaintiff who bases his claim upon a transaction which is tainted by illegality would get no relief whatsoever regardless of the degree of culpability of the defendant or the justice of the case. This is because the traditional illegality defence is not based on "a principle of justice" but on "a principle of policy". We shall discuss briefly this development below.

[45] In the said case, the plaintiff gave money under an agreement to the defendant to bet on the price of some shares on the basis of insider trading information. The scheme did not succeed but the defendant did not return the money to the plaintiff as agreed. The plaintiff brought an action based on contract and the principle of unjust enrichment for the return of the money. The defence was that the contract was illegal and therefore the principle of *ex turpi causa non oritur actio* applied. The traditional approach to the illegality defence which was re-affirmed in *Tinsley v. Milligan* [1994] 1 AC 340 was that an action that relies upon an illegal conduct to found a cause of action would fail however unfair that may be on the facts of the case. In that case, Lord Goff at the House of Lords echoed what Lord Mansfield said in the old case of *Holman v. Johnson* [1775-1802] All ER Rep 98, ie, the illegality defence is not founded on a principle of justice but in general principles of policy. The relevant passage from the judgment of Lord Goff is as follows:

> The principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties in litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other.

[46] Although insider trading is forbidden by law and the plaintiff in *Patel v. Mirza* (*supra*) had to rely on his illegal conduct to establish his claim, plaintiff was allowed to recover his monies by the English Supreme Court. Thus, reliance on illegal conduct did not necessarily disentitle a plaintiff from obtaining relief. Lord Toulson who delivered the leading majority judgment jettisoned the inflexible "reliance test" that was re-affirmed in *Tinsley v. Milligan* (*supra*). His Lordship formulated a "trio of considerations" from case law that should be taken into account in order to determine if the public interest would be harmed if an illegal agreement is enforced. The said policy considerations appear in the following passage of the judgment of Lord Toulson:

> In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

[47] *Patel v. Mirza* (*supra*) has been cited with approval and applied by our courts, most notably by the Federal Court in *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2019] 1 CLJ 183; [2019] 4 MLJ 141; and the Court of Appeal in *Pang Mun Chung & Anor v. Cheong Huey Charn* [2018] 8 CLJ 663. In approving the test laid down by Lord Toulson, Hasan Lah FCJ who delivered the unanimous judgment of the court said as follows:

> [126] In addition, we find that the test laid down by Lord Toulson in *Patel* that is to say, the trio considerations, is a sensible one, which we should follow. Applying the test to the facts of this case, we find that it is an overkill for the first defendant to lose the subject land for the infringement of the two Acts which is punishable by a fine upon conviction.

[48] In *Pang Mun Chung & Anor v. Cheong Huey Charn* (*supra*), the approach in *Patel v. Mirza* (*supra*), was described by Harmindar Singh Dhaliwal JCA as being "consistent with upholding the integrity and harmony of the law by achieving an equitable result based on the facts in each case". We shall now turn once more to the facts of the instant case to see if they lend themselves to the application of the trio of considerations mentioned in *Patel v. Mirza* (*supra*). We find that some of the facts discussed earlier that distinguishes the instant case from the *Neway* case (*supra*) are the very facts that bring the claim of the appellant, within the ambit of the trio of considerations.

[49] The first policy consideration is the underlying purpose of the prohibition that was transgressed and whether the purpose will be enhanced by denial of the claim. We pointed out earlier in para. [24] that the Land Ordinance (Sabah) (Cap. 68) bars sale of land held under customary tenure under Part I and land held under native title to a non-native. The Land Ordinance (Sabah) (Cap. 68) was enacted in 1930 during the colonial period. The obvious purpose of the prohibition in ss. 17 and 64 is to protect native ownership of land held under native title and customary tenure. However, in the instant case, it would take a stretch of the imagination to argue that denying relief to the appellant would enhance the purpose of the prohibition or in other words enhance protection for native land ownership in Sabah.

[50] In the first place, the appellant is not a party that is in the contemplation of s. 17. It is neither a native seller or buyer of native land. It is the mere financier of a non-native (first respondent) who purchased mainly sub-leases of native titles. The agreement also provided for the transfer of the native titles to a native nominee (the second respondent). However, the second respondent is not a nominee in the ordinary sense who would have no interest in the land as we explained earlier. He was the managing director and shareholder of the non-native *de facto* purchaser. In other words, barring the appellant from seeking relief from the non-native buyer (the first respondent) and the guarantors (which includes the second respondent) who would have indirectly benefited from the loans in question cannot be said to enhance protection of native ownership of land. In any event, the appellant is not seeking registration of any native title which can be construed as divesting ownership of land to a non-native owner. Unlike in the *Neway* case (*supra*), the native nominee (the second respondent) did not execute a trust deed or power of attorney to give away his interest in the title to the first respondent. The appellant is only seeking to enforce remedies under the loan and guarantee agreements which will not have any impact on native ownership of land. Neither can seeking remedies under the loan and guarantee agreements amount to recognition of the first respondent as the actual owner or recognition of the second respondent as a native nominee. Thus, the purpose of prohibition in question in ss. 17 and 64 of the Land Ordinance (Sabah) (Cap. 68) that rendered the sale and purchase agreements illegal will not be enhanced if the appellant is denied relief.

[51] The second policy consideration is whether any other public policy would be affected by denial of the claim. As we said earlier, the appellant as a bank is only seeking to recover the loans granted to the first respondent and which were guaranteed by the second to fifth respondents. The bank had nothing to do with the sale and purchase agreements in question. The first loan was given about five months after the execution of the sale and purchase

A agreement. The loans to develop the property was given out more than a year later. As counsel for the appellant submitted, if the appellant is denied relief merely because the actual buyer, seller and nominee had participated in illegality in view of the native status of the land title, banks would be burdened with the onerous duty to investigate the purpose of loans and
B details of transactions involving nominees and actual purchasers. In the Federal Court case of *Chang Yun Tai & Ors v. HSBC Bank (M) Bhd & Other Appeals* (*supra*) which we discussed earlier, one of the issues that arose was whether the loan agreement was valid regardless of the alleged illegality of the sale and purchase agreement. Zulkefli Makinudin FCJ cautioned that the
C courts should not impose onerous duties that will render banking business impractical and burdensome in the following passage of the judgment:

> [15] It is to be noted the SPA has already been executed before the end financing facilities were granted. Therefore the respondent can presume that the SPA which the appellants had entered into has been ascertained by the appellants to be valid. It would be too onerous to require the
D respondent to investigate or enquire into a transaction or contract to which they are not a party. Banking business will be rendered impracticable and burdensome if this was so. In this regard the courts should not impose such a requirement that may impede the flow of commerce. On this point Edgar Joseph Jr FCJ in *The Co-operative Central Bank Limited (In Receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300
E in delivering the judgment of this court cautioned at p. 313 as follows:
>
> > ... a commercial Judge must be anxious about the impact that a decision may have on the proper functioning of the commercial community.

F In the premises, in our opinion, the second policy consideration also favours the granting of relief to the appellant in respect of the loans given out to the first respondent.

[52] The third policy consideration is whether denial of the claim would be a proportionate response to the illegality. Lord Toulson in *Patel v. Mirza*
G (*supra*) said that the danger of "overkill" or disproportionate response by totally refusing relief under the classic approach to the illegality had been pointed by judges in earlier cases. The relevant passages are as follows:

> 104. As to the dangers of overkill, Lord Wright gave a salutary warning in *Vita Food Products Inc v. Unus Shipping Co Ltd* [1939] AC 277, 293:
>
H
> > Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and
I sufficient grounds.

105. To similar effect Devlin J questioned "whether public policy is well served by driving from the seat of judgment everyone who had been guilty of a minor transgression" in *St John Shipping Corpn v. Joseph Rank Ltd* [1957] 1 QB 267, 288-289.

106. In *Saunders v. Edwards* [1987] 1 WLR 1116, 1134 Bingham LJ said:

> Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.

[53] Lord Toulson suggested the following relevant factors which are non-exhaustive be considered to determine whether denying relief would be disproportionate:

> … the seriousness of the conduct, its centrality to the contract, **whether it was intentional** and whether there was marked disparity in the parties' respective culpability. (emphasis added)

[54] In our opinion, even if the loan agreements were tainted by illegality, it is obvious that there was lack of intention on the part of appellant who is a mere financier. It is the respondents, especially, the second and third respondents who intended to commit an illegal transaction as they signed the sale and purchase agreements. The lack of intention on the part of the purchaser to advance an unlawful purpose was found to be relevant by the Court of Appeal in *Norsitah Ottoh & Ors v. Rosinah Nasry & Ors* [2018] 1 LNS 1585. It is interesting to note that the above-mentioned case was decided without the benefit of the *Patel v. Mirza* (*supra*) decision. A number of contested issues of fact and law were considered by the Court of Appeal and High Court. However, the facts pertaining to s. 17 of the Land Ordinance (Sabah) (Cap. 68) are these. The original native land owner sold some native title lands in 2001 to a non-native as he faced financial difficulty in servicing his loan with a bank. Some of his heirs signed another agreement in 2007 to rescind the earlier agreement. The transferees in the second agreements were natives of Sabah. In respect of the illegality issue, the Court of Appeal gave consideration to the fact that the parties had no intention to advance an unlawful purpose. The relevant passages in the judgment of the Court of Appeal are as follows:

A [65] As the sale was to help the plaintiffs' late father to settle the loans, the sale was not to infringe s. 17 of the Land Ordinance of Sabah. **We found that the appellants and the respondents in the very beginning did not have any intention to advance any unlawful purpose.**

[78] The Appellants submitted that if the Court should find that the
B arrangement between the 1st Appellant was illegal, then the Respondent were also parties to an illegal act. Their late father and they had taken part in an illegal act by selling their lands to a non-native in 2001. In other words, learned counsel for the appellants contended that the "in *pari delicto*" rule applies to this case in that the Respondent would not be able to assert the rights under the Sale and Purchase Agreement.

C [79] With respect, we could not agree with the Appellants' contention. As alluded to earlier, the Agreement was merely for the purpose to help the late Nasry to settle the loan and not for any illegal purpose. **We find that the appellants and the Respondent in the first place did not have any intention to advance any unlawful purpose.** The Respondent has not
D acted in *pari delicto* as alleged by the Appellants.

(emphasis added)

[55] In the above-mentioned case, the culpability of the direct parties to the transaction in question, ie, the seller and buyer of native title land was called into question in relation to the breach of ss. 17 and 64 of the Land Ordinance
E (Sabah) (Cap. 68). As evident in the above-mentioned passages, the Court of Appeal found that they did not have any intention to advance any unlawful purpose.

[56] In the instant case, the culpability of the appellant is miniscule compared to that of the respondents whose blatant and unmitigated illegality
F runs like a thread throughout the transaction in question. Now, it must be appreciated that under ss. 17 and 64 of the Land Ordinance (Sabah) (Cap. 68), the prohibition against dealings in native land by non-natives is directed at the actions of direct parties to a sale transaction. The said provisions do not expressly outlaw a bank from financing such a transaction.

G **[57]** The enormity of the culpability of the respondents must also be viewed in the light of the actions that led to the winding up of the first respondent. It must be recalled that it was the fourth and fifth respondents who petitioned for the first respondent to be wound up. Once the illegality argument was picked up by the winding-up court, none of the respondents
H contested it. On top of that, in the instant civil action, the fourth and fifth respondents are counterclaiming for return of the documents of title to the liquidator of the first respondent. As for the second respondent, he has counterclaimed for discharge of the charges that he executed on the native titles and the return of the same to him. Thus, on the one hand the second

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to fifth respondents are claiming that the appellant cannot rely on the loan agreements and related documents that are allegedly illegal but on the other hand, they are seeking the aid of the court for the return of the lands which were charged in the same alleged illegal transaction. They are thus guilty of approbating and reprobating and if we may add, guilty of bad faith as well. In *Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor* [2017] 6 CLJ 368 which was cited by counsel for the appellant, the Court of Appeal quoted the following passage from *Vershures Creameries Ltd v. Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608, in which Scrutton LJ explained the principle as follows:

> A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that that it is valid, and then turn around and say it is void for the purposes of securing some other advantage. That is to approbate and reprobate the transaction.

[58] Therefore, it is plain that the second to fifth respondents are unjustly using their own illegal action to seek to reap a multi-million dollar windfall from a financial institution. We are of the opinion that even if the loan agreements are tainted with illegality, to deny that appellant relief would be an unconscionable and a totally disproportionate response. For reasons given earlier, we are satisfied that this case falls within the said trio of policy considerations. Therefore, even if the loan agreements and the related documents are tainted by illegality upon application of the *ratio* in the *Neway* case (*supra*), we have no hesitation in holding that the appellant can still seek relief. For the same reason, the counterclaims of the second to fifth respondents that attempt to deprive the appellant of their lawful security for the loans should be dismissed.

Restitution Under Section 66 Of The Contracts Act 1950

[59] Section 66, shorn of illustrations, reads as follows:

> 66. Obligation of person who has received advantage under void agreement, or contract that becomes void
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> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.
>
> 71. Obligation of person enjoying benefit of non-gratuitous act
>
> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[60] As noted by Professor Visu Sinnadurai in the *Law of Contract* (4th edn, 2011, para. 8.210, which was cited by the Federal Court in *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997; [1999] 3 MLJ 81), s. 66 is a restitutionary provision which has no direct parallel under English law. In *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, it was described as providing "an equitable remedy". Even if the agreements in question are unenforceable, restitution is permissible under this section. In *Menaka v. Lum Kum Chum* [1976] 1 LNS 181; [1977] 1 MLJ 91 (cited in *Contracts Act, A Commentary* by Professor Visu Sinnadurai at para. 66.05) which is a Privy Council case from Malaysia, Lord Fraser of Tullybelton referred to the restitution principle behind s. 66 in the following passage:

> Section 65 of the Indian Contract Act, 1872, is in terms identical with those of section 66 of the Contracts (Malay States) Ordinance, 1950. The principle underlying both sections is the same, and it is that:
>
> > a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation.
>
> See *Babu Raja Mohan Manucha v. Babu Manzoor Ahmad Khan* (1942) LR 70 Ind App 1, 10.

[61] Malaysian courts have generally held that where parties had knowledge of the illegality or had intention to contravene the law, no remedy will be given under the section (see the Federal Court case of *Ng Siew San v. Menaka* [1973] 1 LNS 99; [1973] 2 MLJ 154 and *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; [1980] 1 MLJ 21). In the *Neway* case (*supra*), the Federal Court did not discuss whether relief should be granted under s. 66. The Court of Appeal discussed it but was reluctant to apply s. 66 because it said that the bank should have investigated the illegality (the judgment is reported as *Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors* [2012] 9 CLJ 1014). The judicial trend to take into account the culpability of the party that seeks to invoke s. 66 is described as "settled jurisprudence" by Professor Visu Sinnadurai in his book that we cited earlier.

[62] A notable departure from this trend was the Federal Court decision in *Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd* [2014] 3 CLJ 141; [2014] 3 MLJ 301. In this case, the Federal Court granted relief under s. 66 although both parties had knowledge of the illegality from the beginning and the contract in question was found to be void and unenforceable. We reproduce the relevant passage below from the judgment of Ramly Ali FCJ:

> [55] Section 66 of the Contracts Act 1950 is clear on this point, that when a contract becomes void (as in the present case) the party who has received any advantage under the contract or agreement is bound to restore it to the person to whom he received it. The advantage to be restored under the section refers to the advantage that he had actually received from the other person. If the advantage received was in the form of 10% deposit of RM1.6m, that same advantage must be restored or refunded to the plaintiff. **If that cannot be done for whatever reason, then the defendant is bound to make compensation for it – either one, not both.** In this regard illustration (d) to s. 66 is instructive:
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> > (d) A contracts to sing for B at a concert for RM1,000, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the RM1,000 paid in advance. (emphasis added)

[63] This judgment has attracted criticism from Professor Visu Sinnadurai (see para. 66.14 of *Contracts Act, A Commentary*). However, in passing, we observe as follows. Section 66 has been said to embody a restitutionary principle which has no parallel in common law. It may have been inspired by rules of equity but resort to it is not the same as seeking relief under equity. A claim under it is also not a claim under the terms of a void contract but it is for restitution from a party that received an advantage under it. And s. 66 does not require absence of knowledge of illegality or lack of intention to contravene the law as a precondition for its invocation. Nonetheless, our courts with rare exceptions of which the *Tan Chee Hoe* case (*supra*) is one, have generally held that in order to invoke s. 66, a party must not have knowledge of the illegality. This strict approach is no doubt similar to the pre-*Patel v. Mirza* (*supra*) traditional approach in common law where a party that is in *pari delicto* is totally barred from enforcing the terms of a void or illegal contract or otherwise obtaining relief under it. But now, even in respect of enforcement of an agreement tainted with illegality, the flexible approach introduced by *Patel v. Mirza* (*supra*), affords relief to the less culpable party in certain circumstances.

[64] Nonetheless, in the instant case, even assuming that the loan agreements are tarred with the broad brush of illegality that stems from the sale and purchase agreements executed by the first respondent, knowledge of illegality cannot be imputed to the appellant. The first respondent gave a representation in the loan agreements that no law was contravened. We also repeat that there was no finding by the court below or the winding-up court that the appellant had knowledge of the illegality.

[65] The learned Judicial Commissioner did not give relief to the appellant under s. 66 because he held that the second to the fifth respondents were mere guarantors. He held that there was no evidence that the second to fifth respondents received any advantage under the loan agreements. We are of the opinion that the learned Judicial Commissioner erred in making this finding. The second to fifth respondents are not mere guarantors who have no interest at all in the first respondent. The second respondent was the managing director at the material time. The native titles were registered in his name. As we said earlier, he has counterclaimed for discharge of the charge and return of the titles. Therefore, it certainly does not lie in his mouth to say that he did not or would not gain any benefit under the loan agreements. The third, fourth and fifth respondents were also directors and shareholders. The total amount of the loans given to the first respondent was RM7,200,000. In the premises, it must be deemed that all the respondents had benefited from the loan agreements. Since, the loans, in all likelihood, would not have been disbursed without the guarantees executed by the second to fifth respondents, the appellant as an innocent party has a right to compensation under s. 66 for the advantage derived by the first respondent and its directors and shareholders (see the *Tan Chee Hoe* case) (*supra*). The third and fourth respondents have also counterclaimed for the return of the native titles to the liquidator of the first respondent. In the premises, there is further reason to assume that they had also derived an advantage from the loans given by the appellant. Therefore, even if the loan agreements are tainted by illegality, we are of the view that the appellant should recover the outstanding balance as prayed in the statement of claim from the second to the fifth respondents.

Working Capital

[66] Although we find that the facts of *Neway* case (*supra*) are distinguishable in that loan agreements and related instruments such as the charge documents are not illegal, for sake of completeness, we shall address the issue of the working capital. The appellant granted working capital in the form of fixed loan and overdraft in the sum of RM5,200,000 more than a year after the sale and purchase agreements were signed. In our view, there is much merit in the submission of the counsel for the appellant that the right of the appellant to sue for the loans is absolutely independent of the said agreements. Therefore, no illegality can attaches to the loan agreements in respect of the working capital in any event.

Conclusion

[67] The prayer of the appellant in the statement of claim against the second to fifth respondents is for the outstanding balance of the loans given to the first respondent. The counterclaim of the second to fifth respondents is for return of the titles and discharge of the charges. For reasons given

above, we are of the view that the entire financing arrangement is not illegal as found by the learned Judicial Commissioner. We also find that the statement of the winding-up court on the legality of the financing arrangement has no effect as it was an issue that was wholly extraneous to the subject matter of the winding-up petition. Question 1 is therefore answered in the negative in that the said winding-up decision has no effect on the documents referred to in sub-paras. (ii), (iii), (iv), (v). We therefore find that the loan agreements and related security documents including all the charges and the guarantees are not illegal and are enforceable. Therefore, we find that the second to fifth respondents are liable to the appellant in respect of its claim under the statement of claim. Question 3 is therefore answered in the affirmative. In the event that the loan documents are void for illegality, for reasons given earlier, we find that the appellant can still obtain relief. Question 6 is therefore answered in the affirmative. In the premises, it is our view that other questions drafted by the learned Judicial Commissioner do not require determination for the purpose of the claim of the appellant and the defence and counterclaim of the respondents. We allow the appeal and accordingly entered judgment for the appellant as prayed. Consequently, we dismiss the counterclaims of the second to fifth respondents. The second and third respondents to pay costs of RM15,000 here and below and fourth and fifth respondents to pay costs of RM15,000 here and below.